STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of:	)	Docket No. 00-AFC-14
	)	
Application for Certification	)	
of the **EL SEGUNDO POWER**	)	**STAFF'S COMMENTS ON**
REDEVELOPMENT PROJECT	)	**THE REVISED PMPD**
	)	
_____	)	

The California Energy Commission (CEC) Staff disagrees with certain findings and recommendations contained in the "Biological Resources" section of the Revised Presiding Member's Proposed Decision (RPMPD) in the El Segundo siting case, issued on April 16, 2004. Staff believes that changes to the RPMPD are necessary to correct legal and factual errors, and to protect the biological resources of Santa Monica Bay. Regarding all other topic areas, the RPMPD correctly includes the proper Conditions of Certification that were agreed to by stipulation of the parties and are essential to the legal integrity and enforceability of the document.

I. THE "BIOLOGICAL RESOURCES" SECTION MUST BE CHANGED

A. Summary of the Revised PMPD on "Biological Resource" Issues

The RPMPD grants the requested license for the El Segundo power plant with none of the "Biological Resource" conditions concerning "once-through cooling" recommended by the Staff, the concerned Agencies (i.e., the California Coastal Commission, the California Department of Fish and Game, and the National Marine Fisheries Service) or the Intervenors in this case. The document does make changes regarding the "annual" cooling water flow cap under the California Environmental Quality Act (CEQA) (**BIO-3),** and adds a new condition (**BIO-4**) requiring the Applicant to perform a 316(b) study under the direction of the Los Angeles Regional Water Quality Control Board (LARWQCB) and meet whatever National Pollution Discharge Elimination System (NPDES) 316(b) requirements the Regional Board may impose before commencing operation of the facility.

However, as discussed below, Staff believes that the RPMPD contains errors of law and fact in this case, and would potentially allow this project to be built and operated without meaningful mitigation of adverse marine resource impacts. In addition, Staff believes

that the RPMPD proposes to adopt a "precedent decision" regarding the role of the Coastal Commission that would effectively deny that agency any special deference in Energy Commission proceedings.

B. The RPMPD Contains Serious Errors

1. The Revised Decision Improperly Delegates Coastal Act and CEQA Issues To The LARWQCB.

The RPMPD rejects the specific recommendations of the Staff, the Coastal Commission, and the Intervenors based largely on a new condition which requires completion of a 316(b) study under the LARWQCB's supervision, and compliance with whatever NPDES-related 316(b) requirements the Regional Board may impose before operation of the facility can commence. (*See, e.g.,* RPMPD at pp. 68-70 and **BIO-4** at pp. 82-83). While this condition is appropriate and necessary to ensure compliance with relevant Clean Water Act requirements, it is both unlawful and ineffective for addressing the requirements of the California Coastal Act and the requirements of CEQA for the following reasons.

(a) <u>This Transfer Of Responsibility Is Contrary To Law</u>

Under long established case law in California, a permitting agency such as the Energy Commission cannot legally transfer or delegate its responsibilities for protecting the environment to another agency, even if that other agency might seek to address the matter further at some later time. <u>See</u> *Sundstrom v. County of Mendocino* (1988), 202 Cal.App.3rd 296, at 306-307; 248 Cal Rptr. 352, at 358-359. While the LARWQCB does have proper jurisdiction over Clean Water Act compliance issues, it is the Coastal Commission and the Energy Commission that are responsible for ensuring compliance with the requirements of the California Coastal Act and Warren-Alquist Act in power plant siting cases such as El Segundo. In addition, it is the Energy Commission (not the LARWQCB) that serves as the "lead agency" for CEQA purposes in site certification proceedings such as this. *See* Public Resources Code (PRC) Section 25519(c). Hence, transferring the Energy Commission's responsibilities for addressing Coastal Act, Warren-Alquist Act and CEQA issues to the Regional Board (as the RPMPD now does) is not allowed under California law.

(b) <u>This Transfer Of Responsibility Will Not Protect The Environment</u>

Transferring responsibility for cooling water issues from the Energy Commission to the LARWQCB will not necessarily ensure that Santa Monica Bay is "restored and enhanced" where feasible (as required by the Coastal Act) for several reasons, including the following:

- *The "Technology Fix" Under 316(b) Is Incomplete and Unlikely To Occur*

The LARWQCB's jurisdiction under Clean Water Act Section 316(b) is limited by the express terms of that law and its related regulations. This is primarily a "Best Technology Available" (BTA) law, requiring only a 60 to 90 percent impact reduction below a vaguely defined "unmitigated" default technology *if feasible*. Thus, the Regional Board can require only a *partial* reduction in cooling water impacts under 316(b), as opposed to the complete restoration and enhancement required, if feasible, under the Coastal Act. Moreover, the record in this case establishes that "dry cooling" and "wet/dry cooling" are infeasible; the RPMPD concludes that the "wastewater cooling" alternative is infeasible; and Staff (as well as all marine resource protection agencies testifying in this case) doubt that the "Gunderboom" technology will be found feasible. Thus, under 316(b) there is a real possibility that the LARWQCB will find that no "technology fix" is feasible in this case.

- *The "Off-site Mitigation Fix" Under 316(b) Is Incomplete and Uncertain To Occur.*

The current version of the 316(b) rules for existing facilities allows "off-site" mitigation to be required if "technology fixes" are found infeasible. However, these off-site mitigation provisions were recently found unlawful for "new" facilities by the federal courts, and a similar court challenge is now pending for "existing" facilities as well. (See *Riverkeeper, Inc. v. United States Environmental Protection Agency* [2nd Circuit, 2004], 358 F. 3rd 174). If "off-site mitigation" for existing facilities is also ruled to be illegal under 316(b), the El Segundo power plant could lawfully obtain a complete "variance" exemption from the LARWQCB, and no "restoration and enhancement" of any kind would be required for this project. At best, the LARWQCB could require only a 60 to 90 percent improvement, not the full and complete improvement which might otherwise be found feasible under the requirements of the California Coastal Act which the Energy Commission is required to enforce.

(c) This Delegation Will Deprive the CEC Of All Jurisdiction Over Cooling Water Issues

If the RPMPD is allowed to stand, the Energy Commission will lose all jurisdiction over the cooling water issues in this case, contrary to the requirements of the Warren-Alquist Act and CEQA. This is because the RPMPD delegates final approval of the 316(b) study exclusively to the Regional Board, not the Energy Commission, and the Regional Board is given complete discretion to determine whether the project meets 316(b) requirements or not. Nothing is effectively retained for the CEC to decide in this matter, and any future disagreements concerning law, fact or policy committed by the Regional Board will no longer be subject to Energy Commission review and approval.

In summary, the RPMPD's transfer to the LARWQCB of the Energy Commission's responsibilities concerning the cooling water impacts of this project is unlawful and is unlikely (for both technical and legal reasons) to adequately address impacts and protect marine resources, as required under the California Coastal Act, the Warren-

Alquist Act and CEQA. In addition, the Energy Commission would delegate all jurisdiction over this issue if the RPMPD, as now written, is adopted.

2. The Revised Decision Adopts An Improper "Standard of Review" For Coastal Commission Recommendations In CEC Proceedings.

The RPMPD proposes to adopt a "precedent decision" holding that the Energy Commission is not legally required to give any special deference to Coastal Commission recommendations except in NOI proceedings. Contrary to the recommendations of the Coastal Commission, the CEC Staff, and environmental Intervenors, the RPMPD holds that the CEC can disregard any Coastal Commission recommendation it finds to be "inappropriate," and it need not make any specific findings of infeasibility or greater environmental harm as required in PRC Section 25523(b). The RPMPD then adds that as a matter of policy the CEC will give "substantial weight" to timely Coastal Commission recommendations unless found to be infeasible, more environmentally harmful or *"inappropriate" based on "clear and convincing evidence" presented to the Energy Commission*. (*See* RPMPD at p. 62).

Contrary to assertions in the RPMPD, the issue of the proper "standard of review" concerning Coastal Commission recommendations in CEC proceedings has never been previously litigated in the El Segundo case, nor have the parties been afforded any opportunity to brief this issue other than in these Comments. However, Staff has addressed this issue to some degree in the Morro Bay case, and further Staff Comments in that case will be filed on April 30, 2004. Accordingly, Staff hereby incorporates all related Staff briefs, comments and arguments in the Morro Bay case by reference herein, and we summarize our disagreements with the "precedent decision" in the El Segundo RPMPD as follows:

(a) This "Precedent Decision" Ignores The Plain Meaning Of Law

Contrary to the fundamental requirements of statutory construction, the RPMPD ignores the "plain meaning" of the language in PRC Sections 30413 and 25523(b). On its face, PRC Section 30413(d) of the California Coastal Act makes it mandatory for the Coastal Commission to participate in CEC proceedings *"[w]henever the [Energy Commission] exercises it siting authority and undertakes proceedings pursuant to the provisions of Chapter 6 (commencing with Section 25500) of Division 15 [of the Warren-Alquist Act] with respect to any thermal powerplant or transmission line to be located, in whole or in part, within the coastal zone . . . ."* (emphasis added). This language plainly and clearly requires the Coastal Commission to participate in all Energy Commission siting cases in which power plants are to be located within the coastal zone, *regardless of whether those proceedings are NOIs, AFCs, SPPEs, etc.*

By contrast, PRC Section 30413(e) gives the Coastal Commission complete discretion to participate in "other proceedings conducted by the [Energy Commission] pursuant to its power plant siting authority." Thus, for example, the Coastal Commission could choose whether to participate in power plant enforcement or penalty proceedings

initiated by the CEC pursuant to its power plant siting authority under PRC Sections 25534 *et seq*.

Turning to the Warren-Alquist Act, the language is equally plain and unambiguous. In all AFC proceedings, PRC Section 25523(b) requires the Energy Commission to prepare a decision which includes such "specific provisions to meet the objectives of [the California Coastal Act] as may be specified in the report submitted by the California Coastal Commission pursuant to subdivision (d) of Section 30413" unless found infeasible or more harmful to the environment.

Thus, if the Coastal Commission has participated in an AFC proceeding, as it is plainly required to do under PRC Section 30413(d), and if it has submitted a report containing "specific provisions to meet the objectives of the California Coastal Act," as the RPMPD acknowledges has been done in the El Segundo case (*see, e.g.,* RPMPD at p. 70), then the plain meaning of PRC Section 25523(b) requires the Energy Commission to adopt the specific provisions in the Coastal Commission's report unless properly found to be infeasible or more harmful to the environment.

(b) <u>This "Precedent Decision" Is Contrary To Clear Legislative Intent</u>

Because the meaning of PRC Sections 30413 and 25523(b) is plain on its face, Staff believes that there is no legal basis for inquiring into the "legislative intent" behind these provisions. However, if a statutory scheme is "ambiguous," then the first requirement of statutory construction is to determine and properly implement the legislature's intent.

In this case, the legislature's intent is clear; i.e., the Coastal Commission is expected to play a unique role in CEC siting cases, subject to specified standards of review by the CEC, regardless of whether the proceedings are initiated by NOIs, AFCs or SPPEs. Briefing on this issue of "legislative intent" has not been previously called for in the El Segundo case. Since it is complex and lengthy to do so prior to the Committee hearing on April 29, and since we expect both the Coastal Commission and the Staff in the Morro Bay case to address this issue in detail, we hereby incorporate by reference all related Staff briefs, comments and arguments in the Morro Bay case, and we respectfully refer the Committee/Commission to all Coastal Commission filings on this issue as well.

(c) <u>The "Precedent Decision" Would Produce Absurd Results</u>

Also contrary to the rules of statutory construction, the proposed "standard of review" in the RPMPD would create what the courts' refer to as "absurd results." For example, in any case in which an NOI is required, the CEC would be required to adopt the Coastal Commission's recommendations for project mitigation in the AFC portion of that case unless found infeasible or environmentally harmful. However, if these <u>very same mitigation conditions</u> are recommended by the Coastal Commission in an "AFC-only" proceeding, the CEC would be able to ignore these recommendations entirely by simply finding that they were "inappropriate."

There is no legal, logical or policy reason to justify such incongruous results in the El Segundo case. Moreover, if the RPMPD is adopted as now written, this standard of review would become a "precedent" that is binding in all future CEC siting cases as well.

(d) The "Precedent Decision" Is Unnecessary To Harmonize The Statutes

Finally, there is no need to adopt the unprecedented standard of review contained in the RPMPD to reconcile the respective roles of the Coastal Commission and the Energy Commission. Simply stated, the Coastal Commission's recommendations must be followed by the CEC unless they are found (based on substantial evidence) to be infeasible or more harmful to the environment. However, the Energy Commission remains the ultimate decision-maker in power plant siting cases (as envisioned by the Warren Alquist Act), provided its decision is rationally based on these two criteria above.

2. The Revised Decision Fails To Make The Proper Legal Findings Concerning Specific Coastal Commission Recommendations In The El Segundo Case.

The RPMPD rejects all of the conditions recommended by the Coastal Commission to "maintain, restore and enhance" the marine environment of Santa Monica Bay and "minimize entrainment impacts where feasible" without making proper legal findings regarding these recommendations. Specifically:

(a) The "Study & Mitigate Prior To Licensing" Recommendation Is Improperly Rejected

The RPMPD rejects the Coastal Commission's recommendation that an impingement and entrainment study be completed and appropriate restoration and enhancement measures be imposed before a license is granted by the CEC in this case. Regarding this issue, the RPMPD does not find that this Coastal Commission recommendation is "infeasible" or that it would cause "greater environmental harm" as required by PRC Section 25523(b), nor does the RPMPD find that this recommendation would be "inappropriate" based on clear and convincing evidence in the record. Thus, the RPMPD fails to make the required legal findings concerning this Coastal Commission recommendation in the El Segundo case.

(b) The "Hyperion Wastewater Cooling" Recommendation Is Improperly Rejected

The RPMPD rejects the Hyperion Wastewater Cooling Alternative recommended by the Coastal Commission and the Staff, based on what Staff believes are erroneous interpretations of law or unsubstantial evidence in the record. First, as documented in earlier Staff filings, a maximum 20 degree Fahrenheit thermal increase in cooling water discharge temperature is not required under either federal or state law, and the RPMPD commits clear legal error in holding otherwise. The existing El Segundo power plant has repeatedly been granted NPDES variances for thermal discharges near shore at temperatures ranging from 105 to 135 degrees Fahrenheit.

Second, treatments to prevent algae buildup caused by wastewater have not prevented the CEC from licensing other power plants using wastewater for cooling, such as the Magnolia plant licensed in 2003, and there is no evidence as to why this issue must do so in this case.

Third, the RPMPD asserts that the wastewater cooling alternative could cause greater environmental harm if it causes the Applicant to refuse to build any project at all. This rationale fundamentally errs by comparing the wastewater cooling option to the "no project" alternative, rather than to the actual project that is being proposed. This is a legally erroneous comparison under California law. Moreover, it ignores the fact that Units 1 and 2 have been completely shut down, and are causing little or no harm to the marine environment at this time.

Finally, although the City Charter for Los Angeles may allow a 120 day "notice to quit" for wastewater services, this does not render the cooling water alternative infeasible because there is no evidence in the record that the City of Los Angeles has ever invoked this provision, particularly against a vital facility such as a powerplant, and in any event Staff's proposed wastewater cooling condition would allow the El Segundo facility to use ocean water as a substitute should such an unlikely emergency ever occur.

In short, while the RPMPD finds that the Coastal Commission's recommended wastewater cooling alternative is "infeasible," this finding is not valid because it is based on a clear error of law regarding thermal discharge requirements, and unsubstantial evidence in the record on all other matters regarding this recommendation.

3. The RPMPD Improperly Rejects The Actual "Existing" Baseline Under CEQA.

The RPMPD dismisses all CEQA concerns by finding that the proposed project will not exceed the five-year average "annual" cooling water volumes that existed at the time the AFC was filed, despite the fact that the project will increase entrainment volumes and related adverse impacts by approximately 25% above the actual annual cooling water intake levels that now exist at the site. The RPMPD addresses this fact by simply stating that the CEC has "normally" used the five year volumetric average established at the time the AFC is filed in other cases. (*See* RPMPD at pp. 48-51).

This response in the RPMPD is legally inadequate for several reasons. First, while CEQA guidelines state that the physical conditions at the time of filing "normally" constitute the proper baseline for analysis, these guidelines do not require this reference point to be used in all cases. To the contrary, the courts and the guidelines both require that CEQA "be interpreted in such manner as to afford the *fullest possible protection* to the environment within the reasonable scope of the statutory language." Title 14, California Code of Regulations, Section 15003. The RPMPD does not satisfy this requirement of CEQA.

Second, in this case the RPMPD ignores a fundamental and permanent change to the physical setting that now exists at the project site simply because this is not what the Energy Commission has done in other cases. This rationale is not based on any substantial evidence showing that similar permanent changes had occurred in these other cases, nor does the decision document how this "normal" approach will afford the "fullest possible protection to the environment" that is reasonable in this case, as CEQA requires. Thus, contrary to law, the RPMPD provides no rational basis for the baseline it is using.

Third, while the Applicant has testified that at times it is pumping 50 million gallons per day (mgd) through Intake #1 to keep that intake clear, the RPMPD cites no evidence establishing how often this is actually occurring or whether 50 mgd is actually needed to keep the intake clear. Even if there were substantial evidence to assume that Intake #1 is pumping 50 mgd every day (as opposed to the "zero" volume needed for cooling water purpose because the plant is now legally closed), this would only total 119.78 billion gallons per year (bgy), not the 126.78 bgy allowed in the RPMPD.[1]

In short, the RPMPD adopts an average annual cooling water baseline level that does not reflect the actual existing physical setting at the site; that will allow a 25% increase in harm to the environment rather than the fullest possible protection; and that is not justified or supported by any substantial evidence in this case.

4. The RPMPD Improperly Rejects The Monthly Caps Required Under CEQA.

The RPMPD also rejects the year-round "monthly" volumetric caps recommended by the leading marine biologists in the country, despite the *undisputed* evidence that marine organisms spawn <u>every month</u> of the year in Santa Monica Bay, and thus will not be fully protected by an "annual cap" or a "seasonal cap" limited only to February, March and April (as the Applicant proposed and the RPMPD approves).

Staff believes that the RPMPD's failure to impose year-round monthly flow caps is inconsistent with the logic presented in the proposed decision itself, and is unsupportable from both a biological and a legal perspective. Initially, the RPMPD dismisses impacts to aquatic resources from entrainment and impingement on the basis that the proposed "annual" flow cap would ensure no change in the physical environment as a result of the project, and thus no additional adverse impacts would occur under CEQA. However, the only way there can be no additional adverse impacts is if average "monthly" flow volumes do

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[1] Staff has calculated the 119.78 bgy figure by adding approximately 18.25 billion gallons per year (i.e. 50 mgd *times* 365 days) to the 101.53 billion gallon under the "zero" baseline case.

not change as well.[2] The RPMPD attempts to address this fact by requiring specific flow caps for the spring months of February, March and April. However, the proposed decision fails to take into account the biological reality that even with a seasonal flow cap in the spring, there could be substantial changes in the physical conditions during other times of the year if intake volumes were increased over previous levels and this change could result in increased impacts to a number of species.

The RPMPD suggests that any seasonal harm which may occur on a given month will simply average itself out over the year, but this statement is not based on any evidence in the record, and it ignores the fact that adverse impacts to one species cannot be "offset" by improved conditions for another species.

In short, the RPMPD will not fully maintain the existing physical conditions in Santa Monica Bay, and the requirements of CEQA have not been satisfied by limiting the monthly flow caps to February, March and April alone.

C. The RPMPD Contains Completely Unprecedented Policies

1. The Project Would Be Approved Prior To Any Sound Scientific Review

The RPMPD would have the Energy Commission approve the El Segundo project without having ever obtained or reviewed any recent, scientifically reliable evaluation of the adverse marine resource impacts this project will cause.[3]

2. The CEC's Responsibilities Would Be Transferred To Another Agency

The RPMPD transfers all Energy Commission responsibilities for once-through cooling issues to the LARWQCB, including matters concerning the Coastal Act, the Warren-Alquist Act and CEQA. The Energy Commission will effectively lose all jurisdiction over this important issue if the RPMPD is adopted as now written.

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[2] This conclusion is unavoidable because the *undisputed* evidence in this case establishes that fish species in Santa Monica Bay exhibit different seasonal patterns of spawning. Some species spawn in the spring, some spawn in the summer, and some spawn throughout the year. Therefore, if the proposed project is allowed to increase its intake of seawater on any given month over pre-project volumes for that month, there would obviously be an increased impact to those species then spawning in the bay.

[3] Even in the *Huntington Beach* case (which was decided during the height of the energy crisis under a Governor's "Declaration of Emergency") the Energy Commission required that a sound scientific cooling water study be completed, and appropriate mitigation (based on review of that study) be imposed by the CEC *before permanent operation of that facility would be allowed*.

3. No Meaningful Mitigation Would Be Required

The RPMPD approves this project without requiring any on-site or off-site mitigation measures or alternatives. Instead, the decision (1) adopts an annual volumetric entrainment "cap" which is well in excess of existing volumes actually being withdrawn at the site; (2) approves the Applicant's proposed study of the feasibility of a Gunderboom-like aquatic filter barrier despite the fact that this technology has never been deployed in open ocean waters like Santa Monica Bay, and has a very "spotty" track-record in other settings; (3) approves the Applicant's proposed payment of $1 million dollars to the Santa Monica Bay Restoration Commission, despite the fact that this "enhancement" amount has not met the legal requirement of the Coastal Act and is extremely small vis-à-vis other recent power plant siting cases; and (4) delegates all responsibility for future impact studies and mitigation to the LARWQCB, which may or may not impose any meaningful mitigation under Clean Water Act 316(b) for the reasons discussed earlier in these Comments

4. No "Due Deference" Would Be Given To Other Agencies

The PMPD gives no deference whatsoever to the unanimous concerns and recommendations of sister resource agencies including the Coastal Commission, the California Department of Fish and Game and the National Marine Fisheries Service, but instead relies on recently adopted EPA rules and speculative LARWQCB actions to address these concerns in some undefined way in the future. The Coastal Commission's role in this and all future Energy Commission siting cases is also weakened substantially in a "precedent decision" concerning this issue.

D. The Decision Is Unnecessary From An "Energy" Perspective

1. Staff Is Not Recommending Project Denial

Staff continues to offer two distinct options which would allow this project to be built, namely the "wastewater cooling alternative" and the "fully mitigated option" referred to as the "3-legged stool." The latter requires (1) appropriate annual and monthly caps to maintain the existing physical environment; (2) completion of a current, scientifically reliable impingement and entrainment study under CEC jurisdiction prior to the start of operation; and (3) the payment of all "feasible" amounts needed to compensate through off-site mitigation for whatever harm the cooling water study shows the project will cause.

2. The New Facility Could Be Fully Operated Under Staff's Proposal

The new facility requires no more the 150 mgd to operate "full-out", at any time, year-round. Staff's "fully mitigated option" would provide the Applicant with approximately 277 mgd, far more than needed for full, duct-fired operation anytime the Applicant desires, year round.

II. CONCLUSIONS CONCERNING THE EL SEGUNDO RPMPD

The El Segundo RPMPD contains serious errors concerning "Biological Resources" and should not be approved as now written. Specifically, the proposed decision improperly transfers Energy Commission responsibilities and jurisdiction concerning cooling water impacts to the LARWQCB; will not properly protect the environment (for both technical and legal reasons); and will not comply with various other provisions of the California Coastal Act, the Warren-Alquist Act and CEQA.

Staff continues to recommend that the Committee/Commission adopt either the "fully mitigated option" or the "wastewater cooling alternative" as reflected in the specific Conditions of Certification contained in Attachment "A" to these Comments. If the Committee/Commission elects to proceed with the decision in its current form, then Staff requests that the Conditions of Certification in the RPMPD be amended as specified in "strikeout" and "underline" form in Attachment "B" to these Comments.

Dated: April 27, 2004

Respectfully submitted,

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ATTACHMENT “A”

STAFF’S RECOMMENDED EL SEGUNDO CONDITIONS

STAFF'S RECOMMENDED CONDITIONS IN THE EL SEGUNDO CASE

The RPMPD for the proposed El Segundo Repower Project needs to be fundamentally revised regarding the "Biological Resources" topic to either:

(A) Require each of the "fully mitigated" conditions consistent with Staff's recommended "three-legged stool" option, namely (i) a proper zero baseline "annual" cap and related "monthly" cap for *every month of the year;* (ii) a reliable site-specific entrainment study completed prior to start of project operation; and (iii) all feasibly affordable funds placed in trust to "maintain, restore and enhance" the marine resources of Santa Monica Bay, consistent with the study's findings. No certification should be issued until the Committee/Commission has reopened the evidentiary record to determine what is feasible for restoration and enhancement in this case. (*See* these conditions in the "Biological Resources" section of the Appendix to Staff's Comments); or

(B) Require the Applicant to file an amended AFC proposing to implement the Hyperion Wastewater Cooling Alternative.

Staff specifically recommends that the following three Conditions of Certification replace the "Biological Resources" conditions in the RPMPD. These Conditions of Certification are necessary to comply with the Warren-Alquist Act, the California Coastal Act and CEQA.

1. Implementation of monthly and annual cooling water flow caps to meet CEQA

BIO-1 The project owner shall implement a total "annual" flow cap on the combined total of Intake #1 and Intake #2 of **101.5 billion gallons per year**. The project owner shall also implement the following combined total "monthly" flow caps for each specified month below (numbers represent million gallons per month):

Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
7635	7231	7519	7176	8038	8370	9923	10,532	10,410	9463	7965	7270

Verification: During project operation, the project owner shall provide to the CPM quarterly reports that detail monthly totals. Quarterly reports will be provided to the CPM within 10 working days following the end of each quarter. Total annual flow and a review of the previous year's monthly flows will be provided in the Annual Compliance Report.

The project owner can request that the CPM consider a variance from a month-to-month flow cap if an emergency situation (e.g. energy crisis) arises.

If the entrainment/impingement study required by **BIO-2**, below, establishes that less stringent annual or monthly flow caps will avoid significant adverse direct or cumulative

marine resource impacts, then the project owner can apply to the Energy Commission for consideration of adjustment of the flow cap requirement(s) in accordance with the study's findings.

2. Completion of an Impingement and Entrainment study to determine impacts prior to the start of project commissioning

BIO-2 The project owner shall conduct a site-specific, reliable, 316(b) scientific study to determine the marine resource impacts of the project's once-through cooling system. This study shall sample the intake and source water to determine the fractional losses of fish larvae and invertebrates relative to their abundance in the source water specific to the El Segundo Generating Station cooling water system.

Sampling design and data analysis protocols shall follow those developed from the recent studies done at Diablo Canyon, Moss Landing, San Onofre, Morro Bay, and Huntington Beach power plants, and the results used to determine the significance of impingement and entrainment losses on fish populations and invertebrates. This analysis shall also determine the cumulative impingement/entrainment impacts of all Santa Monica Bay coastal power plants on nearshore fish populations and other marine organisms. The study protocols, analysis, results, and conclusions of the monitoring study shall be documented in a scientific style report and submitted to the CPM for review and approval. Other agencies, including the California Coastal Commission, the National Marine Fisheries Service, the California Department of Fish and Game, and the Los Angeles Regional Water Quality Control Board shall be consulted in the development and review of the study design. These agencies will also be involved with the review of draft reports and a final report upon completion of the study.

Verification: Within 90 days of Energy Commission certification, the project owner shall provide an impingement/entrainment study plan for approved by the CPM, in consultation with the agencies listed above. Within 30 days of the CPM's approval of the study plan, the project owner shall commence the actual study, and complete this effort as soon thereafter as possible. During the study, the project owner will provide to the CPM monthly status reports including all data collected within 10 working days of the end of the previous month and quarterly analyses of study results within 10 working days of the end of the previous quarter's field sampling. The project owner will provide to the CPM a draft final report within 60 days of completion of the impingement, entrainment, and source water sampling studies, and a final report within 120 days from the end of field sampling.

3. Submittal of all funds needed to guarantee the "restoration and enhancement to the extent feasible," of the marine resources of Santa Monica Bay

BIO-3 The project owner shall pay all feasible restoration and enhancement funds, as determined and ordered by the Energy Commission prior to certification, into a Santa Monica Bay Restoration and Enhancement Trust Account.

Verification: Within 90 days of Energy Commission certification of the project, the project owner shall deposit the restoration and enhancement funds required by the Energy Commission into such trust fund as specified by the CPM.

ATTACHMENT “B”

STAFF’S EDITS TO EL SEGUNDO RPMPD CONDITIONS

BIOLOGICAL RESOURCES CONDITIONS OF CERTIFICATION

Staff has reviewed the "Biological Resources" Conditions in the El Segundo RPMPD, and finds inconsistencies between the Conditions shown on pages 79 and 80 and the actual Conditions of Certification shown on pages 81 through 83 of the proposed decision. Additionally the Conditions of Certification lack standardization and consistency with the Energy Commission's policy requirements for post-certification monitoring and jurisdictional control.

Accordingly, as reflected in "strikeout" and "underline" form below, Staff has made revisions to the Conditions of Certification now contained on pp. 81-83 of the RPMPD to make these conditions legally enforceable under Energy Commission jurisdiction, and to ensure that these Conditions can be clearly understood without ambiguity. Staff has also added a new condition **BIO-5** to the Conditions contained in the RPMPD to ensure that the Energy Commission will retain jurisdiction to require restoration and enhancement in accordance with the 316(b) study required in **BIO-4**.

BIO-1 ~~Prior to commercial operation,~~ The project owner shall place $1,000,000 USD in trust to the Santa Monica Bay Restoration Commission. Use of the funds in trust shall ~~must~~ be restricted to improving understanding of the biological dynamics of Santa Monica Bay and for purposes of improving the health of the Santa Monica Bay ecosystem. ~~biological habitat. This could include fish population studies, entrainment studies, or other studies approved by the Santa Monica Bay Restoration Project that focus on the Santa Monica Bay habitat.~~ The funds in trust shall be administered by the Santa Monica Bay Restoration Commission, whose authority in determining the use of the funds shall be absolute. The Santa Monica Bay Restoration Commission shall have the responsibility to publish the results of any study(ies) conducted with the funds, and to account to the CPM for the disposition of the funds in trust in ~~a timely and detailed manner~~ an annual report.

Verification: Within 90 days of certification, ~~T~~the project owner shall submit to CPM a copy of the receipt transferring the ~~stipulated amount~~ $1,000,000 USD to the Santa Monica Bay Restoration Commission. ~~If the Santa Monica Bay Restoration Commission conducts and publishes study(ies), the project owner shall provide a copy of such study(ies) to the CPM.~~

BIO-2

a. ~~In consultation with the Los Angeles Regional Water Quality Control Board,~~ tThe project owner shall conduct a study to determine the feasibility of constructing, deploying, and operating an aquatic filter barrier at Intake #1 at ESGS in consultation with the CEC, Los Angeles Regional Water Quality Control Board (LARWQCB), State Lands Commission, US Coast Guard, National Marine Fisheries Service, California Department of Fish and Game, the California Coastal Commission, and the US Army Corps of Engineers,

(the Working Group). The feasibility study shall at a minimum ~~also~~ determine expected benefits and potential impacts of the aquatic filter barrier if deployed and operated at Intake #1. The feasibility study ~~shall~~ may be submitted to the Los Angeles Regional Water Quality Control Board for possible use in implementing regulations under 316(b) of the Clean Water Act.

b. If the Working Group ~~Los Angeles Regional Water Quality Control Board~~ finds that it is feasible to construct and operate an aquatic filter barrier and that the ESGS Intake #1 site is suitable for deployment, ~~a demonstration and orders~~ the project owner shall ~~to~~ install an aquatic filter barrier on Intake #1 in compliance with all applicable laws, ordinances, regulations and standards. ~~316(b) regulations, t~~The project owner shall construct, ~~and~~ operate, and maintain the aquatic filter barrier for the life of the plant or until such time as a new Best Technology Available (BTA) becomes feasible for installation. In the event of storm, wave action or vessel damage to the aquatic filter barrier the project owner shall curtail operations to the lowest monthly flow cap until the aquatic filter barrier is repaired or replaced.

Verification:

a. Within 12 months of certification, ~~T~~the project owner shall submit to the CPM ~~and the LARWQCB a complete analysis and all~~ the results of the feasibility study ~~as part of the evaluation involved in implementing applicable 316(b) regulations~~ and all Working Group study comments.

b. In the event that the aquatic filter barrier is determined to be feasible, the project owner shall submit to the CPM, no less than 90 days prior to the proposed deployment, all state and federal permits, State Lands Commission lease, federal agency approved Final Environmental document(s) and US Coast Guard approved design.

c. If it is determined that the aquatic filter barrier is feasible, the barrier shall be installed and operational prior to commercial operation.

d. If the aquatic filter barrier is deployed, the project owner must within 30 days of its deployment, provide to the CPM photographic and any other evidence that verifies that the filter barrier has been installed and is operational. If the aquatic filter barrier is installed, the project owner shall report, in the Annual Compliance Report, on the successes and failures of the aquatic filter barrier during the operational life of the aquatic filter barrier.

BIO-3 The project owner shall implement an annual cap on flow on the combined total of Intake #1 and Intake #2 of 126.58 billion gallons and shall also cap the monthly flow volumes as shown below. ~~in February at 9.4 billion gallons, March at 9.8 billion gallons, and April at 10.0 billion gallons. If future NPDES permitting establishes that an annual flow cap is not necessary to avoid significant impacts then the project owner shall apply for and receive changes~~

~~to this Condition of Certification that removes the annual flow cap requirement. If the NPDES permit for ESGS is changed to incorporate entrainment control technology that confirms less than significant impacts then the project owner shall apply for and receive changes to this Condition of Certification that removes the annual flow cap. The project owner shall report any communication with the LARWQCB regarding renewal or modification of the NPDES permit for ESGS.~~

(Billion Gallons Per Month)

JAN	FEB	MAR	APR	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC
8.6	7.9	8.3	8.5	9.5	11.0	13.9	14.8	13.7	12.1	9.3	8.9

Verification: Project owner shall report to the CPM all communication efforts with the LARWQCB regarding ~~entrainment and~~ NPDES permit renewal or compliance. Project owner shall report, in its Annual Compliance Report, monthly flow volumes for the combined Intake #1 and Intake #2.

If future NPDES permitting establishes that an annual and / or monthly flow cap is not necessary to avoid significant impacts, then the project owner may apply to the CEC for changes to this Condition of Certification that either modify or remove the annual and / or monthly flow cap requirement. If the NPDES permit for ESGS is issued to incorporate entrainment control technology that results in less than significant impacts, then the project owner may apply to the CEC for changes to this Condition of Certification that modifies or removes the annual and /or monthly flow cap.

BIO-4 ~~Prior to commencement of commercial operation, the project owner shall reduce entrainment through the ESGS cooling water intake #1 by at least 60 percent and impingement by at least 80 percent, both from unmitigated levels, as directed and required by the LARWQCB under section 316(b) of the federal Clean Water Act.~~ Pursuant to the implementation of federal regulations enacted under 316(b) of the Clean Water Act and at the direction of the Energy Commission's CPM and the LARWQCB, the project owner shall conduct a study of the entrainment and impingement effects of Intake #1. ~~While recognizing the authority of the LARWQCB to determine the final 316(b) study design,.~~ T~~t~~he Commission directs the project owner to consult with other agencies, including the California Coastal Commission, the National Marine Fisheries Service, environmental stakeholders and the California Department of Fish and Game~~, as well as the CPM~~ (316(b) Working Group), in the development of the 316(b) study design. The study will be completed and required mitigation, based on the studies results, implemented prior to commercial operation.

~~The facility-wide flow cap required by Condition of Certification BIO-3 shall expire upon completion of the requirements of the Condition, including any flow cap required by the LARWQCB.~~

Verification: ~~Project owner shall submit proposed changes to this Condition, as required, to correspond with final regulations issued under section 316(b) of the federal Clean Water Act.~~ Within 120 days of project certification, the p~~P~~roject owner shall submit to the CPM copies of the final 316(b) study plan. The project owner shall commence the study within 60 days of CPM and LARWQCB study design approval. ~~all correspondence and submittals to the LARWQCB related to the implementation of section 316(b) regulations. Project owner shall inform the CPM of all 316(b)-related decisions by the LARWQCB and steps taken by the project owner pursuant to LARWQCB direction. Project owner shall report to the CPM when 316(b) regulations and corresponding entrainment or flow reductions or restoration measures have been implemented.~~

If upon completion of the study it is determined that changes in power plant operation and/or facilities are necessary to comply with Clean Water Act regulations to reduce and mitigate impacts to the marine environment, then the project owner must apply to the Commission and receive approval for a project amendment prior to commercial operation.

BIO-5 If the impingement and entrainment study (required by Condition of Certification **BIO-4**, above) determines that significant impacts to one or more species of marine organisms is occurring, the project owner shall provide compensation funds for restoration and enhancement of Santa Monica Bay marine organisms and their habitats. Upon consultation with the project owner, the compensation funds shall be used for such things as tidal wetlands restoration, creation of artificial reefs, or some other form of habitat compensation that is sufficient to fully address the species impacts identified in the final report required by Condition of Certification **BIO-4**. The CPM, in consultation with the project owner and state, federal, local resources agencies, and the 316(b) Working Group, will determine the amount and final application of the compensation funds. When appropriate compensation is determined, the project owner will prepare and sign a Memorandum of Understanding, (MOU) with the entity that will receive the compensation funds. The MOU will clearly identify acceptable uses of the funds, including an accounting of how the funds will be spent.

Verification: The CPM will review the draft MOU to ensure the wording is clear, meets the terms of the restoration and enhancement needs, and that it is enforceable. The CPM will ensure the MOU is completed within 90 days of determination of the need for compensation and identify a monitoring and reporting program. The project owner will provide written verification to the CPM that the compensation funds have been paid within 30 days after signing the MOU for the disposition of required compensation funds.